CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

73-1045/a

20 SEP 1973

Honorable Richard H. Ichord, Chairman
Committee on Internal Security
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

Thank you for your letter of 5 September 1973, forwarding a copy of your views on H. R. 1281 and similar bills dealing with Federal employee rights. I have read this material with interest and appreciate your courtesy in keeping us informed of your position in this matter.

Sincerely,

/s/ W. E. Colby

W. E. Colby
Director

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WASHINGTON, D.C. 20515

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September 5, 1973

Hon. William E. Colby
Director, Central Intelligence Agency
Washington, D. C. 20505

Dear Mr. Colby:

Several bills introduced in the Senate and the House have been a matter of great concern to me, because of their possible adverse impact upon the efficiency of Federal loyalty and security programs. I particularly refer to S. 1688, introduced by Senator Ervin, and H. R. 1281 and similar bills introduced on the House side, having the ostensible purpose of protecting Federal employees against alleged invasions of their privacy. I am sure that you must share that concern.

I have been asked to testify on H. R. 1281 and like bills now pending before the Waldie Subcommittee on Retirement and Employee Benefits of the House Committee on Post Office and Civil Service. I forward herewith a copy of my views for your information.

Sincerely yours,

Richard H. Ichord
Chairman

RHI:amn

Enclosures

STATEMENT OF CONGRESSMAN RICHARD H. ICHORD
ON H. R. 1281 and SIMILAR BILLS,
BEFORE THE SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS
(Committee on Post Office and Civil Service)

September 5, 1973

Chairman Waldie and Members of the Subcommittee:

Chairman Waldie has informed me that Senator Ervin has sponsored legislation having as a stated purpose the protection of Federal employees against alleged invasions of their privacy and that similar bills have been introduced in the House, including H. R. 1281, introduced by Mr. Wilson, which had been referred to this subcommittee. He asked me to testify in connection with the consideration of this bill (H.R.1281) and others like it, namely, H. R. 856, H. R. 1125, H. R. 1579, and H. R. 2064. I thank you for this opportunity to present my views with regard to these measures.

As you may know, on reference to the Committee of two prior Senate-passed bills, S. 782 of the 91st Congress and S. 1438 of the 92nd Congress, introduced by Senator Ervin, which were predecessor bills of S. 1688 introduced by him in the 93rd Congress, I had expressed strong opposition to the Ervin bills in correspondence with the Chairman and Members of the Subcommittee on Manpower and Civil Service which at that time had these measures under consideration.

The bill H. R. 1281, and similar bills introduced in this Congress, appear to be modified versions of the earlier bills introduced by Senator Ervin. While it seems to me that H. R. 1281 is a vast improvement of the earlier and later efforts of Senator Ervin, it is still, in my opinion, subject to serious objections. I therefore oppose such measures, at least in their present form. For convenience of reference I shall relate my remarks to the provisions and pagination of H. R. 1281.

Of course I support in principle the policy expressed in section 7171 of the bill, and I am generally in accord with the view that limitations should be recognized by administrative personnel in relation to the areas of inquiry with which the bill treats in section 7173. But it is likewise evident that, at least within recent years, the need for such limitations has been fully recognized in executive regulations. No doubt this action has, in large part, been prompted by expressions of congressional concern. Nevertheless, it does not appear that there are presently any serious problems on subjects encompassed by the bill. The present restrained program, applied by the executive agencies, would not seem to justify the legislative action proposed. (See the attached responses which have been made to my inquiry by the General Counsel of the Civil Service Commission and the Department of Justice, dated respectively June 27 and August 21, 1973, attached hereto and marked Exhibits A and B.)

Apart from the question of necessity for legislation upon these subjects, I am not in accord with the rigid approach taken by this bill in its endeavor to control the exercise of executive discretion. In its present form section 7173 endangers and subverts important policy considerations in the maintenance of the integrity of the Federal Civil Service and would unduly obstruct the Executive in its duty to protect the civil service against the incursions of foreign agents, disloyal persons, the mentally ill, homosexuals, racists, and other unsuitable persons. Despite the exceptions which the bill endeavors to spell out, the bill's inflexible prohibitions upon inquiry would impair the operation of the Federal civilian employee loyalty, security, and suitability screening programs now maintained pursuant to law and regulations. It also trespasses upon the President's constitutional appointing power.

In view of the threat posed by the bill to the effectuation of the above mentioned vital governmental programs, there must be some positive recognition of the need for a more reasonable balancing of the equities between the public right to know and the individual's personal interest in maintaining the privacy of his past conduct. The public right on the one hand, and the individual's private interests on the other, ought not to be wholly weighted on either side. The public interest must be equally asserted and, to that end, it must be realized that, to the extent necessary to respond to this interest, an individual who seeks governmental—that is, public—employment must in some degree, and for such purposes, be held by his action, in entering the public domain, to have shed his cloak of privacy.

I am, moreover, unequivocally opposed to the provisions of sections 7174 through 7176. They erect a wholly unnecessary and wasteful apparatus in the creation of a so-called Board on Employee Rights and confer a monstrous power upon the Federal Judiciary which in the expansion of its authority to intrude upon the executive can have no other tendency than to intimidate the vast body of efficient, dedicated, and responsive Federal administrators and thus tend to immobilize the administration of the business of Government. In the following, I shall be more specific.

PARAGRAPH (1), SUBSECTION(a), OF SECTION 7173

First, I direct your attention to paragraph (1), subsection (a) of section 7173, at page 2, line 16, of the bill. This paragraph would prevent inquiry into an applicant's "race, religion, or national origin," with certain exceptions. It apparently operates on the assumption that an individual might be embarrassed by such inquiries, or that they might possibly result in some invidious discrimination that will be practiced upon him by reason of the disclosures. Nevertheless, it makes no allowance for the interest of the Government in ascertaining the identity of particular individuals and facilitating the conduct of investigations to ascertain their suitability for

employment in positions both non-sensitive and sensitive (the latter embracing "national security" aspects as such words of art are now commonly understood). The exceptions to prohibited inquiry do not include one of major significance, that of ascertaining an individual's identity in relation to such matters as arrest records or activities of a subversive or criminal nature in which he may have engaged and which are relevant and necessary to determine his suitability for employment in accordance with the requirements of law and executive orders.

The exception provided in sub-paragraph (B), which is confined only to inquiries concerning "national origin," when the inquiry is considered necessary or advisable to determine an individual's suitability for assignment to activities related to the national security, etc., is obviously not adequate to relieve the prohibition of the objection. Moreover, I direct attention to the fact that the term "national security" has come to be a word of art and has, at least in employment aspects, been related to "sensitive" positions only. See Cole v. Young, 351 U.S. 536 (1956), and the report of the subcommittee of the Committee on Internal Security, "The Federal Civilian Employee Loyalty Program," House Report No. 92-1637.

There are other objections to the prohibitions imposed by paragraph (1), of subsection (a), which serve to emphasize what I have previously indicated that when we endeavor to go beyond more general expressions of policy, without leaving to the Executive the details of implementation, or according to it some measure of discretion, we inevitably run into the almost insuperable problem of endeavoring to spell out exceptions for every conceivable situation. It is to be observed, for example, that the flat prohibition upon inquiry into race and national origin may seriously interfere with expressed Federal policy which has a purpose of enlarging opportunity for the employment of blacks and, also it seems, of other ethnic groups, Spanish-surnamed or Indian, with a view toward achieving their more balanced representation in Federal employment. If such inquiry is to be prohibited, it is evident that there will be some difficulty in carrying this policy into effect.

In addition, I am not certain that the prohibition upon inquiry into "religion" will not have serious adverse consequences in certain instances where a particular religion is of such character as to be clearly relevant to an individual's suitability for employment. I am referring to religions which have clearly defined anti-social and anti-Government objectives, such as the Black Muslims, and other religious groups which, for example, teach and advocate the propriety of the use of drugs and even of making human sacrifice, a subject which I hereinafter treat more fully in my observations regarding the prohibitions upon inquiry into religious beliefs or practices as provided in paragraph (4).

SUBPARAGRAPH (B), PARAGRAPH (3), SUBSECTION (a), OF SECTION 7173

Second, I am particularly disturbed with the possibly disastrous effect which the provisions of sub-paragraph (B), of paragraph (3), at page 4, commencing at line 21, may have upon the loyalty and security programs maintained pursuant to E. O. 10450 and Civil Service regulations. This provision prohibits an executive agency from making inquiry into, or any report or response concerning, "any activity or undertaking of the employee not involving his official duties," with certain exceptions. It is clear to me that your objective in this clause is a very worthy objective of prohibiting any executive agency or officer from intruding upon an individual's private life unrelated to, and not affecting the performance of, his official duties. However, in seeking to protect this legitimate interest the bill has, I believe, totally overlooked, and has not provided for, the legitimate interest of the Government in protecting itself against disloyal or dangerous employees. As presently worded, and despite the exceptions provided, this provision would appear to prevent inquiry of an employee of any of his activities, whether indulged in during duty hours or on off-duty hours, that may be subversive in character or in furtherance of his activities and associations with subversive organizations, including but not limited to Klan-type groups. It will not be practicable in most instances to prove that such activities are within the language of your specific exception, "conflict with, or adversely affect the performance of, his official duties." Yet such activities are properly the subject of investigation under existing laws and executive orders. Indeed, to preclude the Government from exploring the subject would even foreclose the employee from making a reasonable explanation of his involvement when the Government is in possession of such information from other sources. In that respect the employees' rights, as well as the Government's, could be impaired rather than advanced. I therefore think that an exception should be specifically noted, permitting such inquiries and requiring reports of activities relevant to determining the individual's suitability for retention in employment on loyalty and security grounds in accordance with the standards and requirements of existing law, executive orders, and agency regulations.

PARAGRAPH (4), SUBSECTION (a), of SECTION 7173

Third, paragraph (4), at page 5, line 8, would prohibit the Government, in certain instances, from making significant inquiries concerning the applicant's or employee's suitability for employment on loyalty and other grounds of vital interest to the Government. The restraints imposed by this paragraph relate to three areas of inquiry: (1) personal relationship with any individual related by blood or marriage, (2) religious beliefs or practices, and (3) attitude

or conduct with respect to sexual matters. While I am fully in accord in principle that there should be some limitation upon inquiry in each of these areas, I am not in accord with the theory that there should be a flat prohibition of all inquiry under all circumstances. The exceptions to this prohibition are not adequate to protect vital governmental interests. I would like preliminarily to analyze the three exceptions contained in the three subparagraphs, commencing at page 5, line 18 and following, designated (A), (B), and (C):

Subparagraph (A) makes exception of all of the aforementioned three areas of inquiry when conducted by "a physician" to enable him to determine whether or not the employee or applicant is suffering from "mental illness." This clause is so drafted that it would appear that these inquiries cannot be conducted by an executive agency through a physician of its own choosing. Nor does it appear that an executive agency could compel response as a condition for employment even in cases where the employing agency would have reason to believe that the applicant or employee was obviously suffering from a mental illness. Only "a physician" may elicit this information or authorize these tests. Presumably, the language of the provision restricts the inquiries to a physician of the applicant's or employee's own choice, and even precludes an agency from establishing a regulation on the subject. It is absurd and unwise to prohibit inquiries in cases where there might be an obvious basis for them, or, in less obvious cases, but where a question arises, to prohibit an employing agency from requiring either submission to tests or response to questions to determine the individual's suitability where a question of mental illness is involved.

Subparagraph (B) makes exception only on one of the subjects of inquiry, and that is with respect to sexual misconduct. This limitation, however, would appear to be unnecessarily stringent. It permits the inquiry into sexual misconduct only when the agency comes into possession of information to that effect independently of any prior inquiry of or admission by the employee or applicant. Employing agencies could possibly live with this limitation in relation to those Federal positions commonly designated as "critical-sensitive" as to which full field investigations are required and which are likely to provide a source of information for the executive agency. Such positions however embrace only about 5% of the entire Federal service. But with respect to other positions, about 95% of the service, as to which full field investigations are not required, it is not likely that the agency will obtain this information as a basis for inquiry. Hence it seems to me that some inquiry on this subject should be permissible. For example, there are even some obvious cases where it would not seem to me too much to require an applicant to respond to a direct question, such as, "Are you a homosexual?" If the executive agency then has no basis for further inquiry, I would agree that no further inquiry should be permissible. As you

know, recent studies in this field suggest the prevalence of this perversion to be upon a larger scale than previously thought, which would appear to justify some inquiry in the circumstances I have noted. See also Senate Document 241, 81st Congress, 2nd Session, titled "Employment of Homosexuals and Other Sex Perverts."

Subparagraph (C) makes exception to one area of inquiry only, and in this instance to questions concerning the personal relationship of the employee or applicant with any individual related to him by blood or marriage. Inquiry is permissible under this provision when the official of the employing agency considers the information necessary "in the interest of national security." I am particularly concerned about the limitation of inquiry on this subject, despite the "national security" exception.

In Senator Ervin's present bill, S. 1688, as was the case in his earlier bills, no similar exception on "national security grounds" was made to the prohibition on inquiries on this particular subject. I objected to his earlier bills on this basis, among others, and in this connection I had written to Chairman Henderson and Members of his Subcommittee on Manpower and Civil Service which had the measures under consideration. I said that the provision of the bill—

> would prohibit relevant inquiries in security investigations, particularly in instances where the person's relatives by blood or marriage have engaged in subversive activities or membership in subversive organizations, or reside behind the "Iron Curtain," and may subject him to blackmail or coercion. This section, if in effect at the time of the investigation of nuclear physicist Oppenheimer, would, for example, have seriously affected the investigation. You will recall that Oppenheimer's brother and wife had been members of the Communist Party and were deeply involved in atomic espionage for the Soviet Union, a critical factor in revoking his security clearance.

On the other hand, while the "national security" exception, which has been written in the bill H. R. 1281, would relieve the provisions of paragraph (4) of this objection regarding "security" investigations, it would not do so with respect to "loyalty" inquiries and other inquiries of relevance to the individual's suitability for employment on other than strictly "national security" grounds as that expression is now understood. Moreover, the exception is limited only to inquiries in the area of personal relationship to individuals related by blood or marriage and does not extend to inquiries in the area of religious beliefs or practices, or with respect to sexual matters. I shall expand upon this point in subsequent matter, but in order fully to understand my objection to the limitation expressed in the concept of "national security," it is perhaps desirable to digress or enlarge

upon this concept of "national security" which has come to have a very special and limited meaning in practice.

In Cole v. Young, supra, to which I have hereinbefore referred, the court had to construe the statutory language of the Act of August 26, 1950, which is similar to that employed in the bill. The Act authorizes the suspension or dismissal of employees when deemed necessary "in the interest of the national security." In construing this language, the Supreme Court held that it related only to positions within the Government which are "sensitive," that is, sensitive in the interest of national security, and that the term "national security" was intended to comprehend "only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare."

The terms "national security" and "security" investigations have become words of art. They have in practice been related only to national defense activities and positions according access to information classified on national security grounds. Yet there are a host of positions which are indeed sensitive on other grounds in the national interest, in relation to persons, for example, who occupy places or positions of proximity to persons who do have access to classified information or its preparation, or have access to information affecting life, property, or the mission of an agency, including restricted information identifying covert informants in aid of investigations not related to the national security, such as narcotics investigations, or occupy supervisory positions in Government which could seriously affect the execution of vital Government policies not directly related to the national security but to the Nation's general welfare. These questions have been fully explored in the Preyer report, a report of a subcommittee of the Committee on Internal Security, titled "The Federal Civilian Employee Loyalty Program," House Report 92-1637. It is worthwhile, I believe, to review this report in light of the problems here in issue.

It is becoming increasingly apparent that the concepts of "loyalty," "security," and "suitability," although overlapping in varying degress, are not identical concepts. They convey significant differences in meaning and consequences. The concept of "security" embraces the "loyalty" concept. On the other hand, the concept of "loyalty" is not necessarily limited to the concept of "security" or "national security." A disloyal person is undoubtedly a "security risk." Yet all security risks are not disloyal persons. An individual committed to the destruction of the system of Government we enjoy must be regarded as a disloyal person. He is also a security risk, because it would be unwise and unsafe to entrust him with the secrets of the Nation or to place him in any position in which he could adversely affect the defense of the

Nation, or do any grave injury to its economic, political, or social structure. On the other hand, an individual who has no such commitment but has some bad habits, such as addiction to alcohol, or loose talk, for example, or whose character has been sullied or debased by criminal associations other than those of a treasonable or subversive nature, cannot be classified as disloyal but may fall within the category of "security risk."

The loyalty factor is thus relevant to all positions in Government, while the security factor is confined to activities or positions which more directly affect the security of classified information or the defense of the Nation. Loyalty is a factor necessarily included in the security question, but all security factors are not embraced within the loyalty concept. On the other hand, the concept of "suitability" is of broadest import and has been more generally applied to all factors affecting an individual's fitness for Federal employment without limitation to the narrower concepts of "security" and "loyalty," although embraced within it. Present "suitability" regulations of the Civil Service Commission include the following bases for disqualification for employment in all positions:

> (a) Dismissal from employment for delinquency or misconduct;
> (b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;
> (c) Intentional false statement or deception or fraud in examination or appointment;
> (d) Refusal to furnish testimony as required by § 5.3 of this chapter;
> (e) Habitual use of intoxicating beverages to excess;
> (f) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
> (g) Any legal or other disqualification which makes the individual unfit for the service.

Executive regulations, particularly E. O. 10450, require that investigations be conducted of all applicants for Federal employment to determine whether or not their employment or retention in employment is "clearly consistent with the interests of national security." It is provided that the investigations shall develop information on subjects similar to that applied in the suitability regulations of the Civil Service Commission, including as well other loyalty and security factors which, inter alia, are specified as follows:

> (2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

In summary, we may relate the foregoing analysis and considerations to the restraints on inquiry imposed in paragraph (4) as applied to each of the three specified areas of inquiry, which have the following consequences despite the exceptions provided in the bill in subparagraphs (A), (B), and (C):

(1) The effect of the prohibitions of the bill on the first area of inquiry, the applicant's or employee's personal relationship with an individual related to him by blood or marriage, would be to preclude all inquiry into loyalty and other suitability factors to which such a personal relationship may be relevant or may furnish significant evidence, and would thus seriously impair the administration and execution of existing programs for determining an individual's suitability for Federal employment on other than "national security" grounds.

(2) The bill would prohibit <u>all</u> inquiry into "religious beliefs or practices" without any exception whatsoever. While this is a delicate area of inquiry and any authority to inquire on the subject should be discreetly exercised, it is nevertheless a fact that there are some "religious" beliefs and practices which are not conventional and which should clearly disqualify an individual in certain instances for Federal employment.

The Federal Judiciary, for example, has declared the Black Muslims to be a religious sect. Yet, it is clear that an individual committed to the beliefs or teachings of that religion may be grave security and suitability risks in Federal employment. Inquiry of adherents of that faith may be necessary to determine their eligibility for Federal employment. J. Edgar Hoover has characterized the Nation of Islam (Black Muslims) as an "all-Negro, violently anti-government and anti-white organization," and further said that it was "a very real threat to the internal security of the Nation." The sect has frequently been involved in litigation. In one instance, Wilson v. Prasse, 463 F. 2d 109 (1972), the Third Circuit had before it the question of restraints on the distribution of Muslim literature among the prison population. The court observed that:

> The writings and teachings of the Honorable Elijah Muhammad have been described as capable to two interpretations by rational persons; first, "as an endorsement of a concept of intense hatred for all whites, who are referred to as 'devils'." Further, these writings and teachings could be interpreted as an endorsement of a concept that whites generally and prison and government authorities, should be defied by Muslim prisoners even when legal orders or demands are made.

There are, moreover, religions that teach the propriety of human sacrifice, torture, and enslavement, and there are religions which have as a part of their dogma the use of drugs. Without expanding upon the variety of religious beliefs or practices of this sort, we need only be reminded of the fact to realize that any such flat prohibition of inquiry on this subject would be most unwise and dangerous.

(3) As to the prohibition upon inquiry into sexual matters and conduct, with a limited exception for such inquiry only in cases where the executive agency possesses information of a "specific" charge of sexual misconduct, it is apparent here that the prohibition is much too restrictive. It would prohibit inquiry of a limited and generalized nature, such as a single question, "Are you a homosexual?" Such inquiry would be prohibited even in cases where the appearance of the individual might suggest the propriety of the inquiry. Further, the limitation as to "a specific charge" of sexual misconduct would even preclude inquiry in cases where there were frequent and persistent rumors within the community of the individual's sexual misconduct, or of his character as a homosexual, unless evidence was at hand of facts which would support a "specific" charge or instance of actual misconduct in which he had engaged. Proof of a specific charge of sexual misconduct is difficult if not impossible to obtain, except possibly through the applicant's own admissions.

PARAGRAPH (6), SUBSECTION (a) OF SECTION 7173

Fourth, paragraph (6), at page 7, line 5, of the bill would prohibit any inquiry into the property or source of income or expenditures of an employee of an executive agency, with the exception of inquiries by the Treasury Department for ascertaining tax or similar liabilities, or by a Federal agency in relation to financial or commercial transactions with the United States. This provision would thus prohibit inquiry as to all other factors of significance in ascertaining the individual's suitability for retention in employment, particularly on loyalty and national security grounds. A Federal employee may be employed by foreign agents and may receive property or income from them for purposes of espionage or sabotage, or from subversive organizations or individuals for the conduct of such as well as other subversive activities, within and without the Government, yet, this flat prohibition of paragraph (6) would prohibit all inquiry on the subject. An individual may also be making personal expenditures by ways of dues and other contributions to subversive organizations and individuals, and yet the provisions of this paragraph would make it unlawful for an official of an executive agency to make any inquiry of him on the subject. The absurdity of this prohibition must be evident on even cursory analysis.

PARAGRAPH (8), SUBSECTION (a) OF SECTION 7173

Fifth, in light of the foregoing, your paragraph (8), page 8, at line 17, of the bill would serve only to tie the hands of the executive in support of the limitations imposed by the preceding paragraphs and, of course, are highly objectionable on that ground and for that reason.

SUBSECTION (b) OF SECTION 7173

Sixth, the provisions of subsection (b) of the bill, at page 9, line 7, in exempting certain specific agencies from the operation of the foregoing paragraphs of subsection (a) does not serve to relieve the situation in any appreciable degree. The limitations imposed in the provisions of subsection (a) apply to all other agencies of the Government which, in varying degrees and ways, exercise national security functions and are not excepted from the operation of the restraints, including such sensitive agencies as the Departments of Justice, State, and Treasury, the Atomic Energy Commission, NASA, and the U. S. Arms Control and Disarmament Agency, to name but a few. Even with respect to the limited specification of exceptions for the Central Intelligence Agency, National Security Agency, and the Federal Bureau of Investigation, you make no exception for equally sensitive investigative agencies such as the Secret Service, those within the Internal Revenue Service, the Bureau of Customs, and the Immigration and Naturalization Service.

SECTION 7174

Seventh, in the establishment of a Board on Employee Rights in the provisions of 7174, at page 10, line 22, of the bill, you superimpose upon the numerous agencies and remedies now afforded in the administration of the Civil Service laws and regulations, a wholly unnecessary apparatus which is not likely to have very much to do, if anything, but will do it in a wasteful and expensive manner. Any prohibition upon the conduct of executive personnel, whether imposed by legislation or by executive order and regulations in limiting inquiries on the few and minor subjects specified in section 7173 of the bill, will obviously be respected by them almost without exception. This new Board that would be created would be even less busy than the lately bemoaned Subversive Activities Control Board, which was the subject of much controversy for similar reasons. It seems to me that the bill would fashion a howitzer to swat a gnat.

SECTION 7175

Eighth, in enlarging the jurisdiction of the Federal courts in the provisions of section 7175, at page 18, line 6, of the bill to afford review of the orders of the Board on Employee Rights, it seems that you are, in the words of Virgil, piling Pelion on Ossa. It is not only unnecessary, but this is one more step toward judicial autarchy. It is not enough that the Judiciary is moving rapidly enough without any assistance from the Legislative Branch toward drawing to itself total power in dictating every aspect of the social, economic, and political life of this Nation. (For the latest incursion by the Judicial Branch upon the Legislative, see for example, Doe v. McMillan, decided May 29, 1973.) This bill would further contribute to the process of making this Nation the most litigious people in the history of civilization. The result of the total effort can serve only to intimidate, distract, harass, and obstruct the vast body of dedicated, able, and law-abiding Federal administrators.

Exhibit A

UNITED STATES CIVIL SERVICE COMMISSION
Office of the General Counsel
Washington, D.C. 20415

June 27, 1973

Honorable Richard H. Ichord
Chairman
Committee on Internal Security
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in further reply to your letter of June 11, 1973, in which you presented a number of questions respecting provisions of H. R. 1281, a bill relating to invasions of the privacy of Government employees. You stated that you understood that I had testified before the Waldie Subcommittee on Retirement and Employee Benefits of the House Committee on Post Office and Civil Service regarding H. R. 1281. Actually, I accompanied Mr. Robert J. Drummond, Jr., Director of the Commission's Bureau of Personnel Investigations during his testimony before the Subcommittee on May 15, 1973. We had been informed by the Chairman of the Subcommittee that the Subcommittee was particularly interested in the Commission's relationship with the House Internal Security Committee, including detailed descriptions of what use is made of that Committee's services, documents, and files by agencies of the Federal Government. We prepared our testimony to respond to this inquiry. A copy of Mr. Drummond's prepared statement is attached.

With respect to H. R. 1281, we are presently preparing comments for submission by the Commission to the House Post Office and Civil Service Committee. However, since H.R. 1281 is identical to H.R. 11150 of the 92d Congress, on which the Commission reported, I believe I can answer your questions on that basis.

Your first questions were with respect to the proposed paragraph (1) to section 7173(a) of title 5, United States Code, contained in section 1 of H. R. 1281. This paragraph would prohibit an Executive agency from requesting or requiring an employee or applicant to disclose race, religion, or national origin (with specified exceptions). You first asked what our present practice is with respect to inquiries of this character. The Civil Service Commission used a self-disclosure method once, in 1966, and has not used it since.

You then asked if we have regulations on the subject. Our regulations are found in Subpart C of Part 713 of Title 5 of the Code of Federal Regulations and Subchapter 3 of Chapter 713 of the Federal Personnel Manual. A copy of these regulations is attached.

Your next question was whether, with respect to inquiries on race, religion, or national origin, we have had any complaint, and if so, how many in number over the past three years. (You later asked the same question with respect to privacy invasions under three other proposed subparagraphs.) The Commission has no current statistics on complaints of invasion of privacy but we do not believe that there are many such complaints. In 1971 the Commission conducted a survey to determine whether employees were using the customary grievance procedures to complain of any of the 11 types of grievances contained in Senator Ervin's prototype bill. We discovered that of 5,688 grievances filed in 25 agencies, only 7 grievances were of the type described in these bills, and 2 of the 7 would not be covered by H.R.11150, 92d Congress (or H.R. 1281, 93d Congress) because of the exclusions in the bill.

You asked similar questions with respect to three other paragraphs in the bill (3, 4, and 6) which I will attempt to answer in turn.

The proposed paragraph (3) would prohibit an Executive agency from coercing, requiring, or requesting an employee to participate in nonwork-related activities or make any report on any nonwork-related activity. Exceptions are made for conflict-of-interest cases, where the activity conflicts with, or adversely affects, performance of official duties, and for public service programs.

The Commission's present (and longstanding) practice is not to coerce or require any participation in nonwork-related activities. The Commission requests participation in public service programs such as the Red Cross blood donor program and civil defense activities but these would be covered by the exception in the bill. A copy of Subchapter S11 of Supplement 990-2 to the Federal Personnel Manual, relating to excused leave for public service programs is attached.

The proposed paragraph (4) would prohibit an Executive agency from requiring or requesting an employee or applicant for employment to submit to interrogation or examination or take a polygraph or psychological test concerning personal family relationships, religious beliefs or practices, and sexual matters. Exceptions are made for physicians in mental illness cases, for officials advising employees or applicants of sexual misconduct charges, and for officials seeking family information in national security cases.

The Commission's practice is not to use polygraph tests, which are only used by the security agencies. We do not inquire about religious beliefs or practices of employees or into their sexual matters or family relationships except where any of these matters relates directly to job qualifications or fitness, as in the cases mentioned in the exceptions and in nepotism under section 3110 of title 5, United States Code.

The proposed paragraph (6) prohibits an Executive agency from requiring or requesting an employee, other than a Presidential appointee, to disclose his property or that of his family. Exceptions are made in cases of tax determinations, tariffs, customs duties or similar obligations to the United States and conflict-of-interest cases.

The Commission's practice is to limit its inquiries as to the property of employees and their families to possible conflict-of-interest cases. The Commission's regulation of agency requirements for financial statements from employees is contained in Subpart D of Part 735 of Title 5 of the Code of Federal Regulations (attached).

Your next question related to the creation of the Board on Employee Rights by the bill. You asked if the Commission did not already have comparable procedures for receiving and hearing complaints related to the subjects covered by the bill. The Commission has always opposed the creation of this independent Board of Employee Rights as the most objectionable feature of the bills that have been introduced relating to privacy of Federal employees. The Commission has maintained that all or part of each of the subjects covered by bills such as H.R.1281 is suitable subject matter for negotiation at the bargaining table between management and employee labor organizations. In addition, the Commission cannot understand why the full measure of the complexities of the administrative procedure statute is applied through a new agency to this narrow range of grievances which have little effect on an employee's career, while the much more serious consequences of adverse actions which result in dismissal are entrusted to the more simple procedures followed by the agencies and the Commission.

Your final question was what the Commission's position is as to the necessity or desirability of this measure. As I stated earlier, the Commission has not yet reported on H.R. 1281. However, I believe that it is safe to say, based on the Commission's position on similar bills in the past Congress, that the Commission would be opposed to enactment of any legislation similar to H.R. 1281 on the grounds that its provisions are unnecessary and would impose a substantial administrative burden on Executive agencies and the Civil Service Commission without any corresponding benefit to Federal employees. So that you may be more fully informed on our detailed reaction to each of the bill's provisions, I am enclosing a copy of the report we sent to Chairman Hanley on October 20, 1971 on H.R. 11150 (identical to H.R. 1281).

Sincerely yours,

s/ Anthony L. Mondello

Anthony L. Mondello
General Counsel

Attachments

Exhibit B

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

August 21, 1973

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on certain questions raised during the course of the hearings on H.R. 1281 and similar bills dealing with the privacy of Federal employees.

Except for several provisions, H.R. 1281 is substantially identical to H.R. 228, 92nd Congress, 1st Session, to which this Department expressed its views in a report to the Chairman, Committee on Post Office and Civil Service, dated March 26, 1971. H.R. 228 was substantially identical to H.R. 1197, 91st Congress, 1st Session, to which the Department expressed its views in a report dated July 10, 1970. We also submitted a report on June 27, 1968, on S.1035, 90th Congress, a similar bill.

In reply to the questions contained in your letter, complaints in matters covered in questions 1 through 4 have never been a problem within this Department and we are unable to recall having received any such complaints from employees or applicants within the past three years. In addition there are no Department regulations governing these matters except for 28 C.F.R. Sections 45.735-22, 45.735-23 and 45.735-24 (copy attached) which require employee disclosures as they might relate to conflict of interest questions. As concerns question 1, which covers disclosure of race, religion or national origin, it should be noted that information of this type required for minority group statistics is obtained through supervisory identification procedures. It should also be noted that those sections of H.R. 1281 relating to questions 3 and 4 are objectionable as written because inquiries regarding sexual matters are, on rare occasion, required to resolve suitability and security considerations. Also there is a need to make financial inquiries when an employee is alleged to be guilty of misconduct. It is essential to protect both the innocent employee and the public interest by expressly permitting inquiries regarding financial interests when undertaken by a law enforcement or internal security authority which has reason to believe that an individual has profited from privileged information, accepted a bribe or otherwise acted improperly.

With respect to question 5 concerning the creation of a Board of Employee Rights, as provided in Section 7174, page 10, line 22, of the bill, we question whether such an independent Board, separate from the Civil Service Commission and designed to address itself solely to alleged

employee grievances, is necessary. Such a Board would clearly appear to encroach upon the Executive's constitutional and statutory powers over the administration of Executive departments, agencies, and their employees (5 U.S.C. Section 7301), fragmenting the personnel authority of the Civil Service Commission and reducing the effectiveness of the personnel authority of the heads of agencies. As suggested by former Civil Service Commission Chairman John Macy in his testimony before Congress, an alternative to an independent Board would be to accord employees the right of appeal to the Civil Service Commission of any grievance arising out of allegations of violations of the rights which would be granted employees by the bill.

It is unclear whether Section 7174's procedure is to replace the appeals process now provided under the Civil Service Commission's regulations, or whether the bill envisions two separate appellant procedures.

An independent Board would interfere needlessly with countless executive, managerial and administrative decisions made on a day-to-day basis by the departments and agencies of the Executive Branch.

Moreover, Section 7175 would not merely authorize a federal district court to review the Board's determination or order adverse to an aggrieved employee or applicant, but would eliminate the "substantial evidence" standard of review in cases where the employee filed a complaint for a trial de novo on the violation or threatened violation of Section 7173(a). Again, this provision contemplates judicial intervention in the day-to-day operations of the Executive Branch.

Although this Department supports the salutary objective of H.R. 1281 and of its predecessors to protect Government employees from unwarranted encroachments on their personal privacy and on their exercise of constitutional rights, the Department recommends, as it has done with respect to prior bills, against enactment of this bill in its present form.

Cordially,

s/Mike McKevitt

MIKE McKEVITT

Honorable Richard H. Ichord
Chairman, Committee on Internal Security
House of Representatives
Washington, D. C. 20515